

REGULATING AND RESOLVING DISPUTES IN E-COMMERCE TRANSACTIONS: INDIAN CONSUMER PROTECTION PERSPECTIVE

DR. JEHIRUL ISLAM

Assistant Professor of Law

Hamdard Institute of Legal Studies and Research

Jamia Hamdard

New Delhi

Abstract: *Information and communication technology has made the world flat with no geographical boundaries. Businesses across the world finding e-commerce convenient for selling products and providing services. Businesses and transactions in the businesses always involve disputes. Law is geographical boundary based which also limits jurisdiction of courts in resolving disputes. Thus, territorial limitations are imposed on implementation of law and judicial power to decide disputes. In business to business transactions, parties to the contract mutually plan, design and execute contracts with the help of legal experts; hence, confusion with respect to applicable laws and jurisdiction of courts in case of a dispute is less likely. However, in e-commerce consumer transactions, consumers do not design, plan and execute contracts with the help of legal experts. Therefore, it has always been an issue of concern about the applicable laws and courts jurisdiction in the event of e-commerce transaction where a seller and a consumer may be in different jurisdiction and sometimes may be in different country. This paper is an attempt to analyse the Indian legislative and judicial approach with respect to jurisdiction in internet activities in general and e-commerce in particular.*

Keywords: *Internet, E-Commerce, Consumer Protection, Territorial Jurisdiction,*

1. INTRODUCTION

Historically, legal frameworks are designed keeping territorial boundaries in mind. When information and communication technology encompassing all the activities of our life, businesses have been trying their best to go digital in selling goods or providing services due to the ease brought forth by selling goods and providing services in e-commerce. This e-commerce has brought many challenges in consumer transactions, where deciding jurisdiction in case of dispute is one of them. The internet has made the world flat without any geographical boundary. E-commerce is built on electronic communication system that travels freely without any territorial boundary. E-commerce does not recognise either jurisdictional or geographic boundaries. This nature of e-commerce creates a challenge in determining jurisdiction of courts in case of a dispute between a consumer and an e-trader.

2. LEGAL ISSUES AND CHALLENGES

Jurisdictional issue is primarily determined by courts in case of any dispute. A court must have jurisdiction of both territorial and personal to decide a dispute. The traditional concept of territory has been changed with the increase of e-commerce; therefore, determining jurisdiction has become a problem. A contract concluded in e-commerce may not attract the traditional principles of jurisdiction. For example, if P, from Mumbai chooses to download an e-book from an e-commerce platform operates from Malaysia; yet, the server of the e-commerce platform is located in Thailand. P pays through credit card. However, P is incapable to download the e-book due to the errors in the platform. Now, P wants to sue the e-trader who is in Malaysia, but the server of the e-commerce platform is in Thailand. Here the question arises: what is the place of resident of the defendant. In e-commerce, a server stores the business including digital products. Hence, a question may arise whether the place of server can be considered as a place of business for determining jurisdiction.



Yet, a server acts as a medium of communication just like telephone or telex machine which are used in offline commercial transaction. Further, an e-trader may use multiple servers for a single e-commerce transaction. For example, one server may be used for hosting website, for receiving orders and payments another server may be used and a third server may be used for storing and uploading digital products. In addition, a server simply provides technical support which does not have authority to make decisions, take responsibility or have autonomy.

Further, in case of an international e-commerce agreement, it is difficult to identify which law of nations will be applicable to such agreement, the law of the nation of the buyer or the law of the nation of the seller. In practice, law of the nation of the vendor is applied in order to bring court proceedings against the vendor. Nevertheless, this practice results in serious inconveniences to consumers. Some cross border e-traders specifically mention in their e-commerce agreements that, though they operate in India, yet, laws of their own nation will govern them. Besides, prosecuting e-traders in other countries is costly, challenging and also time consuming. The ability of the internet to make a virtual global market has made the traditional geography based laws in India incompetent to tackle the issues attached to the borderless nature of e-commerce transactions. It would not be exaggerating to say that e-commerce reduces a state's capability to safeguard its domestic consumers and to regulate or control the goods or services which cross its geographical boundary.

The difficulty in locating an e-trader is another unique challenge of e-commerce. Home pages, e-mail domains, electronic addresses of e-traders may not signify their geographical location. Hence, determining jurisdiction in such a situation would be difficult. It has been observed that no presumption can be made about the place of business of the e-trader merely relying on the sole fact that the domain name or email address of the e-trader is connected to a particular country.

Moreover, disputes or legal rights in e-commerce may not be limited to contractual disputes or rights. Jurisdiction may be contractual and non-contractual. Non-contractual jurisdiction encompasses jurisdiction to regulate an e-commerce platform as well as the e-trader, which also raises an issue of concern for consumer protection. In addition, e-commerce site or app comes with "terms of service" agreement, that is subject to their own local laws, thus, any transaction with such site or app would bind a consumer to such agreement, and if any dispute arises, the consumer may have to resort to the principles of "private international law". However, application of the traditional principles of jurisdiction in a borderless internet transaction has remained challenging for the courts.

The peculiarities of the internet and the anonymity in the internet as well as in e-commerce posed difficulties in determining jurisdiction that resulted in creating puzzles in the minds of consumers. Additionally, locating the geographical address of e-commerce platforms is a difficult task for a consumer. Thus, due to the jurisdictional problems, despite many consumer issues have arisen in e-commerce, only a small number of cases have been brought to consumer forums and courts. Further, considering the nature of e-commerce, enforcement of judgments of courts and laws of one country over the defendants in another country is problematic. In most of the cases (where the transaction value is small), the costs of enforceability are more than the benefit derive.

Another issue with respect to dispute resolution and jurisdiction in e-commerce is the use of arbitration clause in consumer contracts in e-commerce. It has been argued that dispute resolution through arbitration is too costly for consumers. Further, in case of cross-border e-commerce transactions, consumers would be confused with respect to the applicable laws governing the dispute, as laws regulating e-commerce are substantially absent in many parts of the world.

Thus, the peculiar nature of e-commerce creates a challenge in determining jurisdiction of courts in e-commerce disputes. In addition, the other major issues with respect to jurisdiction in e-commerce are: use of jurisdictional clause and arbitration clause in consumer contracts; anonymity in e-

commerce; difficulties in identifying the geographical location of e-traders; determination of applicable law, jurisdiction in cross border e-commerce transactions; difficulties in enforcing judgments or orders of courts or tribunals over foreign nationals in cross border e-commerce transactions; and jurisdiction of authorities to regulate foreign e-commerce platforms as well as e-traders.

3. JURISDICTION IN E-COMMERCE TRANSACTIONS AND THE LEGAL POSITION IN INDIA

In deciding jurisdiction of courts in contractual disputes, the place where the “cause of action” has arisen plays an important role. The place where the contract is formed is considered as a place where the part of “cause of action” has arisen. In case of non-instantaneous mode of communication, a contract is formed at a place where acceptance of the offer is despatched. Whereas, in case of instantaneous mode of communication, a contract is formed at a place where the acceptance of the offer is received. Section 13 of the Information Technology Act, 2000 incorporates provisions to identify the place of despatch and receiving of electronic communication, which helps in identifying the place of formation of e-contact, and that decides the place of “cause of action” and jurisdiction of courts. Section 13(3) of the Information Technology Act, 2000 reads as:

“(3) Save as otherwise agreed to between the originator and the addressee, an electronic record is deemed to be despatched at the place where the originator has his place of business, and is deemed to be received at the place where the addressee has his place of business.”

Further, section 13(5)(b) of the Information Technology Act, 2000 provides the following provision which reads as:

“(5) For the purposes of this section,-

(a)

(b) if the originator or the addressee does not have a place of business, his usual place of residence shall be deemed to be the place of business;”

Hence, in applying the principles of section 13 of the Information Technology Act, 2001 and the principles of contract law, it may be concluded that in e-commerce, a contract is formed at the place of business or the place of residence of a consumer, the place where the consumer receives acceptance to his offer in e-commerce. Thus, “cause of action” partly arises at the place of business or residence of the consumer (where the consumer makes the offer and the e-trader accepts that offer), in the event of any consumer dispute in e-commerce. Therefore, by virtue of the provisions of section 13 of the Information Technology Act, 2000 principles of contract law and rules of “cause of action”, consumer may knock the door of the court having territorial jurisdiction over his place of business or residence. However, the provisions under section 13 of the Information Technology Act, 2000 are subject to the contract between the parties, which gives an upper hand to the e-trader to override the default rules laid down in section 13 of the Information Technology Act, 2000.

So far as exercising jurisdiction over foreign e-traders is concerned, the Information Technology Act, 2000 provides for extra territorial application of the Act. Section 75 of the Information Technology Act, 2000 expands its applicability outside the country. Section 75 of the Act reads as:

“Act to apply for offences or contravention committed outside India.—(1) Subject to the provisions of sub-section (2), the provisions of this Act shall apply also to any offence or contravention committed outside India by any person irrespective of his nationality.

(2) For the purposes of sub-section (1), this Act shall apply to an offence or contravention committed outside India by any person if the act or conduct constituting the offence or contravention involves a computer, computer system or computer network located in India.”



However, it has been observed that the above provision is applicable with respect to the offences and contraventions as provided under the Information Technology Act, 2000. Since the Information Technology Act, 2000 is an industry-based law, hence it apparently does not address the issues of local consumer grievances. Secondly, whether the authority established under the Information Technology Act, 2000 would have power over foreign e-traders who enter into contract with consumers over the internet is not clear under the existing provisions of the Information Technology Act, 2000. Further, presuming the e-traders would be bound by the authority, yet, foreign e-traders may simply ignore such authority.ⁱ It has been argued that the extraterritorial application of the Information Technology Act is “only self-claimed”. This provision of the Information Technology Act, 2000 cannot compel foreign courts to enforce judgments passed by Indian courts on the basis of the provisions laid down in the Information Technology Act, 2000.ⁱⁱ

The Delhi High Court in *Banyan Tree Holding (P) Limited v A Murali Krishna Reddy*ⁱⁱⁱ has dealt with the issue with respect to the jurisdiction of the civil court involving internet related disputes. In this case, the plaintiff was a company having registered office at Singapore, involved in hospitality business and used the word mark “Banyan Tree”. The company maintained two websites, www.banyantree.com and www.banayanreespa.com. Both the websites of the plaintiff are accessible from India. The defendant was a company having office at Hyderabad. The defendant had started a project under the name “Banyan Tree Retreat”, which the defendant had advertised on its website www.makproject.com/banyantree. The plaintiff filed the suit for passing off or infringement of trade mark of the plaintiff, and requested the court to issue an injunction against the defendant. With respect to the jurisdiction of the court under section 20 of the Civil Procedure Code, 1908 to entertain the claim, the plaintiff argued that the defendant has its presence in Delhi through its website www.makprojects.com/banyantree.htm. The plaintiff also contended that the defendant’s website was not a passive website. Apart from giving contact information through its interactive website, the defendant’s website also sought inputs and feedback from customers. Moreover, the defendant also offered its services to customers in Delhi. In addition, due to the universality and ubiquity nature of the internet and World Wide Web and its utility features, the cause of action arose within the jurisdiction of Delhi High Court.

The single judge of the Delhi High Court made a referral order to the double judge bench on the issue of jurisdiction. The division bench had referred several cases from the USA, Canada, the United Kingdom and Australia. The division bench has also analysed various tests, such as, “Purposeful Availment Test”^{iv}, “Zippo Sliding Scale Test”^v, “Effects Test”^{vi}, “Real and Substantial Connection Test”^{vii}. The bench observed that:

“Having surveyed the law as it has developed in different jurisdictions, this Court is of the view that the essential principles developed as part of the common law can be adopted without difficulty by our courts in determining whether the forum court has jurisdiction where the alleged breach is related to an activity on the internet. At the outset, this Court does not subscribe to the view that the mere accessibility of the Defendants website in Delhi would enable this court to exercise jurisdiction. A passive website, with no intention to specifically target audiences outside the State where the host of the website is located, cannot vest the forum court with jurisdiction.

...

This Court hold that jurisdiction of the forum court does not get attracted merely on the basis of interactivity of the website which is accessible in the forum state. The degree of interactivity apart, the nature of activity permissible and whether it results in a commercial transaction has to be examined. For the ‘effect’ test to apply, the plaintiff must necessarily plead and show prima facie that the specific targeting of the forum state by the defendant resulted in an injury or harm to the plaintiff within the forum state. Secondly, to show that an injurious effect has been felt by plaintiff it would have to be shown that viewers in the forum state were specifically targeted. Therefore, the



‘effect’ test would have to be applied in conjunction with the ‘sliding scale’ test to determine if the forum court has jurisdiction to try a suit concerning internet based disputes.

...

This Court is hold that in order to prima facie establish that the Defendant purposefully availed of the jurisdiction of this court, the plaintiff would have to show that the Defendant engaged in some commercial activity in the Forum State by targeting its website specifically at customers within that state. It is consistent with the application of the ‘tighter’ version of the ‘effects’ test which is ‘targeting’. A mere hosting of website which can be accessible from anyone from within the jurisdiction of the court is not sufficient for this purpose. Also a mere posting of an advertisement by the Defendant depicting its mark on a passive website which does not enable the Defendant to enter into any commercial transaction with the viewer in the forum state cannot satisfy the requirement of giving rise to a cause of action in the forum state. Even an interactive website, which is not shown to be specifically targeted at viewers at the forum state for commercial transaction, will not result in the court of the Forum State having jurisdiction. In sum, for the purposes of Section 20(c) CPC, in order to show that some part of cause of action has arisen in the forum state by the use of internet by the defendant, the plaintiff will have to show prima facie that the website, whether euphemistically termed as ‘passive plus’ or ‘interactive’, was specifically targeted at viewers in the forum state for commercial transaction. The plaintiff would have to plead this and produce material to prima facie show that some commercial transaction using website was entered into by the Defendant with the user of its website within the forum state and that the specific targeting of the forum state by the Defendant resulted in an injury or harm to the plaintiff within the forum state.”^{viii}


With respect to the issue, whether through any “trap orders” or “trap transactions” plaintiff can establish a *prima facie* case, the division bench observed:

“The commercial transaction entered into by the defendant with an internet user located within the jurisdiction of the forum court cannot possibly be a solitary trap transaction since that would not be an instance of ‘purposeful’ availment by the Defendant. It would have to be a real commercial transaction that the Defendant has with someone not set up by the plaintiff itself. If the only evidence is in the form of a series of trap transaction, they have to be shown as having been obtained using fair means. The plaintiff seeking to establish jurisdiction on the basis of such trap transactions would have to aver unambiguously in the plaint, and also place along with it supporting material, to prima facie show that the trap transactions relied upon satisfy the above test.”^{ix}

Hence, the observation of the Court in this case reveals that mere accessibility of e-commerce website from a particular place does not confer jurisdiction on the courts of that place.^x However, it may be noted that in between the active and passive websites, there are websites which are neither fully active nor fully passive, where websites facilitate users to exchange information. Hence, based on the commercial nature of exchange of information and the level of interaction, it is for the court to declare jurisdiction.^{xi}

Apart from the above provisions, courts in India may also follow the Principles of International Law in order to exercise jurisdiction over foreign websites. The following are the four principles recognised as principle of International Law for deciding jurisdiction:^{xii}

- A. Passive personality test: As per this theory, any act in foreign nation which is harmful to the national of the forum state, the foreign national may be punished for such act.
- B. Protective principle: According to this principle, if the act of aliens, which is done from abroad affects security of the state, the state can assume jurisdiction over aliens.

- 
- C. Extra territoriality principle: As per this principle, if the acts occurring abroad have effect within the forum state, the courts in the forum state can interfere with the acts occurring in foreign state.
 - D. Universal principle: According to this principle, it is a matter of international public policy to suppress any criminal activities like trafficking, hijacking. Therefore, exercising jurisdiction in such cases is justified.

In civil matters, it has been recognised that by the agreement between the parties, parties may determine applicable law and jurisdiction. Yet, in the absence of such terms in the contract, the jurisdiction can be decided on the basis of following objective principles:^{xiii}

- A. Place of business or habitual residence of the person who has to perform the contract.
- B. For the performance of the contract, the place where necessary step was taken.
- C. Place where an invitation to enter into contract or an advertisement was received.
- D. Place where an agency or a branch is located.

However, in case of consumer contract, it has been recognised that mandatory rules of national law shall apply irrespective of the choice of law.^{xiv}

4. CONCLUSION

Thus, in an internet dispute, each party, service providers may come from different jurisdictions and the effect of its transaction might be felt altogether in a different jurisdiction; therefore, it is justifiable for the state to assume jurisdiction over the internet based disputes. The internet allows everyone to deal with the people of every country in the world. Even without soliciting any customer in any state, simply with a website, one can receive order for illegal goods, bets for any prohibited services or behavior from any jurisdiction. Due to the pervasiveness of the internet, without really trying, it may be literally everywhere. Thus, without accepting the burden of being held liable wherever they do business, one cannot take the benefit of the convenience of the internet.^{xv} Though in absence of specific provision in the Information Technology Act, 2000 the Delhi High Court in *Banyan Tree*^{xvi} case tried to evolve principles to determine jurisdiction of the court in the internet related activities, however, the following issues remain unanswered: (a) the issues with respect to jurisdiction to regulate foreign e-commerce platforms doing businesses in India; (b) use of legality of jurisdiction exclusion clause or choice of law clause (by foreign e-traders) in e-commerce consumer contracts; (c) the issue with respect to anonymity in internet resulting in lack of clarity pertaining to geographical location of e-commerce platforms; (d) the issue of enforcement of Indian court's judgment in foreign nation.

Thus, the Indian legal position is ambiguous and unclear without any specific principle for the court with respect to the jurisdiction of courts in e-commerce. Hence, concrete principles are needed to determine jurisdiction of Indian courts in the virtual world.^{xvii}

REFERENCES:

-
- [1] Pratima Narayan, 'Jurisdiction Concerns in E-Consumer Contracts' in Ashok R Patil (ed) *25 Years of Consumer Protection Act: Challenges and the Way Forward* (Chair on Consumer Law and Practice, National Law School of India University 2014).
 - [2] PD Sebastian, 'Governance of Cyberspace: Some Reflections on Jurisdiction' in Vimlendu Tayal (ed), *Cyber Law Cyber Crime Internet and E-Commerce* (Bharat Law Publications 2011).
 - [3] [2009] MANU/DE/3072.
 - [4] According to "Purposeful Availment Test" to avail the jurisdiction the court the plaintiff has to establish that the defendant purposefully directed its activities in the forum state. It is also known as "minimum contact" test. (*International Shoe Co v Washington* [1945] 326 US 340). This test was further explained in *Burger King Corp v Rudzewicz* [1985] 471 US. In this case, the court



modified the “purposeful test” and stated that “purposeful availment would not result from ‘ransom’ or ‘fortuitous’ contacts by the defendant in the forum state, it requires the plaintiff to show that such contracts resulted from the ‘action by the defendant himself that created a substantial connection with the forum state. He must have engaged in ‘significant activities’ within the forum state or have created ‘continuing obligation’ between himself and residents of the forum state”. See also *Ballard v Savage* [1995] 65 F.3d 1495. Under this test, even a passive website could attract the jurisdiction of the court in *Inset System Inc v Instruction Set Inc* 937 F Supp 161 (D Conn 1996). In this case, the defendant used its website for advertisement of its goods or services. The plaintiff, a company situated in Connecticut had brought an action for infringement. The court held that through advertisement the defendant directed its activity in the forum state. However, in *Bensusan Restaurant Corp v King* [1996] 937 F Supp 295 (SDNY), the court held that “creating a site, like placing a product into the stream of commerce, may be felt nationwide or even worldwide but, without more, it is not an act purposefully directed towards the forum state”. See also *Asahi Metal Industries v Superior Court* [1987] 480 US . In *Neogen Corp v Neo Gen Screening Inc* [2002] 282 F3d 883, 890 it was held by court of appeal that “purposeful requirement is satisfied if the website is interactive to a degree that reveals specifically intended interaction with residents of the state”.

- [5] The ‘Zippo’ sliding scale test was developed in the case of *Zippo Mfg Co v Zippo Dot Com, Inc* [1997] 952 F Supp 1119. In this case court observed that “General Jurisdiction permits a court to exercise personal jurisdiction over a non-resident defendant for non-forum related activities when the defendant has engaged in ‘systematic and continuous’ activities in the forum state. In the absence general jurisdiction, specific jurisdiction permits a court to exercise personal jurisdiction over a non-resident defendant for forum-related activities where the ‘relationship between the defendant and the forum falls within the ‘minimum contract framework’”. Finally, the court developed three tests to determine specific personal jurisdiction over a non-resident defendant: “1) ‘minimum contacts’ with forum state, 2) the claims of the plaintiff must arise out of those contacts, 3) it must be reasonable to exercise jurisdiction.” See also *Cyber sell, Inc v Cyber sell. Inc* [1997] 130 fF.3d 414.
- [6] In *Calder v Jones* [1984] 465 US 783, the effective test was first evolved. According to the “effective test”, if the effect of the website is felt in the forum state, the forum court can exercise jurisdiction. However, it also suggests that the website of the defendant must have resulted some harm or injury to the plaintiff in the forum state. The “tighter version of effective test has been recognised, which mean intentional targeting, because it has been observed that several jurisdiction is bound to feel the effect of the website”. See also *UJEF et LICRA v Yahoo! Inc et Yahoo France*, [2000] Tribunal De Grande Instance de Paris, No RG:00/0538.
- [7] The Canadian Supreme Court in *Morguard Investment Ltd v De Savoye* [1990] 3 SCR 1077 had developed the “real and substantial connection” test for determining jurisdiction in the internet. In this case the court observed “it seems to me that the approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties”.
- [8] [2009] MANU/DE/3072. Paras 38, 42 and 45.
- [9] [2009] MANU/DE/3072. Para 58.
- [10] Ammu Charles, ‘E-Commerce Laws: Law and Practices’ (1st edn, Eastern Book Company 2019) 48-49.
- [11] Pratima Narayan, ‘Jurisdiction Concerns in E-Consumer Contracts’ in Ashok R Patil (ed) ‘25 Years of Consumer Protection Act: Challenges and the Way Forward’ (Chair on Consumer Law and Practice, National Law School of India University 2014).
- [12] Sarla Gupta and Beniprasad Agrawal, *Cyber Laws: Law Relating to Information Technology, Hacking, Intellectual Property Rights, Trade Marks, E-Commerce, Computers, Computer Software, Internet and Cyber Crimes etc* (2ndedn Premier Publishing Co 2016) 976.
- [13] Sarla Gupta and Beniprasad Agrawal, ‘Cyber Laws: Law Relating to Information Technology, Hacking, Intellectual Property Rights, Trade Marks, E-Commerce, Computers, Computer Software, Internet and Cyber Crimes etc.’ (2ndedn Premier Publishing Co 2016) 976.
- [14] Reed C, ‘The Internet Law, Text and Materials’ cited in Sarla Gupta and Beniprasad Agrawal, ‘Cyber Laws: Law Relating to Information Technology, Hacking, Intellectual Property Rights, Trade Marks, E-Commerce, Computers, Computer Software, Internet and Cyber Crimes etc.’ (2ndedn Premier Publishing Co. 2016) 976.
- [15] Sarla Gupta and Beniprasad Agrawal, ‘Cyber Laws: Law Relating to Information Technology, Hacking, Intellectual Property Rights, Trade Marks, E-Commerce, Computers, Computer Software, Internet and Cyber Crimes etc’ (2ndedn Premier Publishing Co. 2016) 976.



[16]Banyan Tree Holding (P) Limited v A Murali Krishna Reddy [2009] MANU/DE/3072.

[17]Mrinali Komandur, 'Jurisdiction and enforcement of E-Commerce Contracts' [2017] International Journal on Consumer Law and Practice 91.